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Supreme Court of the United States

65

OCTOBER TERM, 1940.

No. 807

31348#7
DAR-DEP

EDWARD J. DARBY & SON, INC.,
Petitioner,

against

WALTER J. ROTHENSIES, Collector of Internal Revenue.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

G. PLANTOU MIDDLETON,
939 Land Title Bldg., Phila., Pa.
Counsel for Petitioner.

Supreme Court of the United States

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

The matter involved is the construction of sec. 609 of the Revenue Act of 1932 (47 Stat. 169) (since repealed) which levied an excise tax upon the sale of forty-one named articles incident to sports or games (naming as to golf only bags, balls and clubs) and upon "games and parts of games * * * and all similar articles commonly or commercially known as sporting goods." The Petitioner made or sold no bags, balls or clubs or other playing implements, but did make and sell certain equipment for golf courses, of which the Collector taxed hole

cups, poles and markers, and exempted ball retrievers, hole cutters, golfball washers and golf bag racks. The Petitioner sued for refund and obtained judgment in the District Court, which the Circuit Court of Appeals reversed.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under sec. 240 of the Judicial Code (28 U. S. C. sec. 347). The date of the judgment sought to be reviewed is December 3, 1940.

QUESTIONS PRESENTED.

When a statute selects for tax specific articles used in games or sports, with a terminal clause taxing "games and parts of games * * * and all similar articles commonly or commercially known as sporting goods," can it be applied to other unenumerated parts of the named games, or to other articles not similar to those specifically enumerated?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in the case of *Brunswick-Balke-Collender Company* v. *Carter H. Harrison, Collector of Internal Revenue,* 116 F. 2d 786 (December 21, 1940) involving the same act and section, and, *inter alia,* the identical point (latter end of opinion).

The Circuit Court of Appeals in the instant case has by resort to general terms and in disregard of the preceding specific enumerations, extended the terms of a

taxing act beyond its fair intent and meaning, in conflict with the following applicable decisions of the Supreme Court:

White v. *Aronson,* 302 U. S. 16;
Gould v. *Gould,* 245 U. S. 151;
U. S. v. *Stever,* 222 U. S. 167;
McBoyle v. *U. S.,* 283 U. S. 25;
Iselin v. *U. S.,* 270 U. S. 245.

SUPPORTING BRIEF.

The text of the statute, arranged to facilitate analysis, is set out in the opinion of Judge Kirkpatrick in the District Court, appearing in the record. As he there points out, the articles taxed are dealt with under three classifications: (1) those specifically enumerated, (2) those embraced by the general terminal words "games and parts of games," and (3) those referred to by the general expression "and all similar articles commonly or commercially known as sporting goods."

The articles here taxed are of course not specifically enumerated in the Act.

The general term "games and parts of games" embraces only games and parts as to which no specific enumeration has been made. The *expressio unius* rule forbids the inclusion of parts of a particular game other than the parts of that game specifically enumerated.

The term "similar articles commonly or commercially known as sporting goods" necessarily and *ex vi termini* means articles similar to those listed. Hole cups, flag poles and markers used as equipment on a golf course have not the remotest similarity in appearance, function or use to golf bags, clubs or balls used as playing implements (6th Finding of Fact).

The Circuit Court of Appeals entirely disregards the rules of *expressio unius* and *eiusdem generis.* In its own words,

> "* * * we state that the phrase 'games and parts of games' is itself a kind of catch-all or basket clause intended to bring within the purview of the taxing act all articles designed and intended for games whether included in the thirteen categories or not."

—and whether or not they are (as the statute itself specifically requires) similar to those named. This is directly contrary to the settled rules, particularly applicable to tax acts, applied by the Supreme Court in the cases above cited.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

G. PLANTOU MIDDLETON,
Counsel for Petitioner.